(12)

No. 91-72

In The

Supreme Court of the United States

October Term, 1991

FEDERAL TRADE COMMISSION,

Petitioner,

v.

TICOR TITLE INSURANCE COMPANY, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF OF AMICI STATES CALIFORNIA, COLORADO, NEBRASKA AND SOUTH DAKOTA IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether States must exercise their authority in regulating private parties (for purposes of the implied exemption from federal antitrust law) by affirmatively reviewing and approving each anticompetitive act of those parties, subject to oversight by the Federal Trade Commission as to the quality or level of the State review and approval.

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INTEREST OF AMICI CURIAE STATES URGING AFFIRMANCE

Amici States urging affirmance have an obvious sovereign interest in preserving their authority to adopt and implement their own regulatory programs. Under our system of federalism, States are free to enact laws which effectively displace competition with regulation designed to further state goals and policies independent of the federal antitrust policies found in the Sherman Act. *Amici* States believe the Third Circuit Court of Appeals in this case properly struck the balance between respect for the

States' sovereign capacity to regulate private entities to meet those State goals and exposure of these entities to federal antitrust law.

While States may act *parens patriae* to enforce federal antitrust law within their boundaries, they are also free to regulate private parties in such a way as to immunize those parties from federal antitrust law. It is for the *States* to decide, by legislation and regulation of the private parties, whether anticompetitive conduct will be sanctioned. *Amici* States have a significant interest in protecting their right to so decide. If States decide their interest in regulating is less than their interest in competition, they are free to decide legislatively to expose private parties to antitrust enforcement. To introduce federal law or agency precedent dictating what level or quality of "review and approval" States must employ to achieve their regulatory goals grossly interferes with the States' rights to regulate private parties within those States. This case presents a question to the Court which impacts directly on these important State interests.

A decision to reverse the Third Circuit would jeopardize *amici* States' authority to effectively enact and implement regulatory schemes displacing competition and would subject those States' law-making authorities to the second-guessing of the Federal Trade Commission as to whether the State schemes provide for sufficiently "meaningful" review. If this Court were to adopt a particular federal standard for the "level or quality" of review by States' regulators, the following unintended results would occur:

- Private parties who engage in State-sanctioned anticompetitive acts pursuant to State laws and regulations will demand State regulatory agencies to review and approve their acts according to their understanding of the federal standard, placing an unwieldy burden on State regulators to meet the imagined level of review and approval;
- State regulators will be forced to adopt and engage in review and approval mechanisms to meet an ever-evolving *federal* "review and approval" standard, solely to satisfy the antitrust exemption for regulated parties, without regard to the *States'* regulatory framework or design;
- State regulators would be put under pressure to increase the number of agency orders placed on the regulated parties (evidencing the formal "review and approval"), but these orders would lead to *greater* restraints on trade and a more anticompetitive environment; and
- State legislatures will be placed under intense pressure to re-write existing, or adopt new, *state* laws to regulate commerce in such a way as to meet the ever-evolving *federal* "review and approval" standard, again, driven by pressure to permit more anticompetitive conduct instead of furthering the goals or policies of the State.

None of these results reflect a respect for the States' right to legislate and regulate as States see appropriate. If the Federal Trade Commission ("FTC") -proposed standard were adopted, States will be driven to adjust their laws and regulations to a *federal* standard based on *federal*

statutory law. States have an interest in furthering their own goals and policies, as long as they are not infirm as measured against the United States Constitution. Consequently, States should be free to adopt legislative and regulatory schemes that serve these goals, free of oversight by the FTC as to how the State schemes are fashioned or by what mechanisms they operate. Given our system of federalism, *amici* States have a profound interest in preserving and protecting their freedom to legislate and regulate their private parties by means they see fit to employ, without unnecessary or unreasonable constraints in federal statutory law.

SUMMARY OF ARGUMENT

This is a case more about federalism than antitrust. It presents the Court with the question of what respect should be accorded by the federal government to the powers and prerogatives of States to adopt and administer regulatory programs designed to achieve State policies and goals independent of federal statutory policies and goals.

The issue before the Court concerns the proper role of the FTC in acting in those areas where the States have established regulatory mechanisms displacing competition and serving States' independent policies and goals. While the federal government and States share an interest in the vigorous enforcement of the statutory directives of federal antitrust law, States are free to regulate private parties in ways that further goals and policies independent of the goals of the Sherman Act. This is true even if

such regulation serves to immunize those parties from federal antitrust law under the "state action" doctrine; in fact, in such cases, antitrust enforcement effectively defeats state regulation. Under our system of federalism, the federal government ought to respect the powers and prerogative of States to legislate, regulate and sanction anticompetitive behavior, even if it appears unwise from the point of view of those charged with enforcing antitrust policy.

The Third Circuit Court of Appeals, recognizing the fundamental principles of federalism that underlie the state action doctrine, correctly decided this case under *existing* standards set forth by this Court to establish whether the state action doctrine provides immunity to the anticompetitive acts of entities actively regulated by the States. Under the final order of the FTC, however, the commission would have subjected the States to unwarranted scrutiny to determine on a case-by-case basis if the States' active regulation meets some imagined measure of zeal or effectiveness. Such federal intrusion into the sovereign affairs of the States would violate the principles of federalism and state sovereignty and inherently presumes a greater value in federal antitrust policy than in the States' individual policies underlying their regulation.

The purpose of the state action doctrine is to defer to the economic self-determination of the States where States meet objective standards signifying the displacement of competition with other independent, *state* interests. Such state economic regulation should be free of federal interference.

The narrow issue before the Court is whether the second prong of the test in *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), requiring a State to "actively supervise" private State-sanctioned anticompetitive conduct further requires a particular heightened level of quality of review and approval by the State of the conduct. *Amici* States urging affirmance argue the active supervision prong is satisfied by the *fact* of supervision. In this case, the Third Circuit found that the revelant States, under state statutes that authorized the anticompetitive conduct in question, "had and exercised" the ultimate power to review and approve or disapprove that conduct, following standards set forth by this Court in *Midcal, Southern Motor Carriers Rate Conference v. United States*, 471 U.S. 48 (1985), *324 Liquor Corp. v. Duffy*, 479 U.S. 335 (1987), and *Patrick v. Burget*, 486 U.S. 94 (1988). The review and approval in this case involved, as the Third Circuit found, checks to see if the rates submitted were within state guidelines, and rates were permitted to go into effect unless, as a result of state review, they were suspended or challenged.

The FTC, however, held such procedures were inadequate to establish that the states exercised their power to review and approve or disapprove. The FTC proposed and the Third Circuit rejected the notion that the state regulatory body must formally and affirmatively review and approve the rates in question. Such a rule wholly fails to respect the federalism basis for the state action immunity.

- Such a rule would substitute the FTC in place of the state regulators, permitting the federal commission to scrutinize and second-guess each challenged act to determine whether the State conducted a sufficiently "meaningful" examination.
- The FTC test would force the state agencies essentially to follow federal administrative law to accomplish independent state goals.
- The FTC test of a formal, affirmative procedure is not necessary for the State to accomplish its goals and policies displacing competition where it deems appropriate. It is enough that the State has a means to supervise and engages in the fact of supervision; that guarantees that the private parties are fulfilling the goals of the State and not just their own.

This Court should give weight to the principles of federalism underlying the state action doctrine by rejecting the FTC approach and affirming the Third Circuit Court of Appeals opinion. Existing standards are adequate to determine whether States actively supervise the parties who engage in State-sanctioned anticompetitive conduct. Proposals to require States to adopt a new, federalized formal "affirmative review and approval" standard should be rejected as inconsistent with federalism and as not furthering the basic purposes of the state action doctrine.

I

UNDER PRINCIPLES OF FEDERALISM AND STATE SOVEREIGNTY, THE STATES' REGULATORY MECHANISMS SHOULD NOT BE SUBJECT TO FTC OVERSIGHT AS TO THE QUALITY OR LEVEL OF "ACTIVE SUPERVISION" REQUIRED TO MEET THE STATE ACTION DOCTRINE

1. Introduction

This case presents an important question of federalism and of the proper role of the Federal Trade Commission in acting in those areas where the States have established regulatory mechanisms serving their independent policies and goals. While the federal government and States share an interest in the vigorous enforcement of the statutory directives of federal antitrust law, and while immunity from that law ought to be narrow, States also have the obligation to shield and protect their powers and prerogatives as sovereign entities under our federal system of government. The issues in this case lie at the cusp of that separation of powers vested in the States on one hand and the national government on the other. Consequently, this is less of a case concerning the reach of antitrust immunity to private parties and more one of respect for the powers and prerogatives of States to regulate commerce within their borders.

The Third Circuit Court of Appeals, recognizing these fundamental constitutional principles, correctly decided this case under *existing* standards set forth by this Court to establish whether the "state action" doctrine provides immunity to anticompetitive acts of entities actively regulated by the States. Under the final order of the FTC, the commission would have subjected the States

to unwarranted scrutiny to determine on a case-by-case basis if the States' active regulation meets some imagined measure of zeal or effectiveness. Such federal intrusion into the sovereign affairs of the States would violate the principles of federalism and state sovereignty and inherently presumes a greater value in federal antitrust policy than in the States' individual policies underlying their regulation. Commissioner Azcuenaga stated it most appropriately in her dissenting opinion in this case:

> "It is not [the FTC's] role to question the correctness of a state agency's decision that proposed rates are reasonable or unreasonable but rather to examine whether a state agency in fact exercises its authority to review privately fixed prices. As an agency concerned with promoting competition, the Commission generally prefers to see prices set by the competitive forces of the market. We have no authority, however, to impose this preference for competition on unwilling states that choose instead to regulate certain industries. To do so would establish the Commission as the arbiters of state policy, a result that the principle of federalism underlying the state action doctrine precludes." (Separate statement of Commissioner Azcuenaga, concurring in part and dissenting in part, in *Ticor Title Insurance Co.*, [FTC] Docket No. 9190, p. 12.)

Reversing the order of the FTC, the Third Circuit Court of Appeals correctly applied existing Supreme Court standards to determine whether the state action doctrine applied. Having found the states in this case "had and exercised" the power to regulate the collective ratemaking for title search and examination services, the

circuit court correctly decided that the FTC erred in requiring more.

2. Principles Of Federalism Underlie The "State Action" Doctrine

In finding state action immune from federal antitrust law, this Court in *Parker v. Brown*, 317 U.S. 341 (1943), expressly rested its holding on the principles of federalism, where, under our "dual system of government [and] the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority . . . " (*Id.* at 351.) Any "unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." (*Ibid.*) As the Court found in *Parker*, the Sherman Act gives no hint that it was intended to restrain state action. As to the proration marketing program in that case, the "State . . . as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit. [*Citations.*] (*Id.*, at 352.) The prorationing "derived its authority and its efficacy from the legislative command of the state and was not intended to operate or become effective without that command." (*Id.*, at 350.) Similarly, in *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc., supra*, 445 U.S. at 105, where the Court found California did not actively supervise its wine pricing system, the Court re-emphasized the state action doctrine "is grounded in our federal structure . . . " (*id.*, at 103), and articulated the two-pronged test whereby the state action doctrine protects *private* conduct that is (1) clearly

articulated as state policy and (2) actively supervised by the state. (*Id.*, at 105.)

While some commentators have argued the Court ought to increasingly subject state regulatory policies to federal antitrust scrutiny because of concern that regulatory programs have been captured by special interests or because it is needed to ensure economic efficiency (see, e.g., Wiley, *A Capture Theory of Antitrust Federalism*, 99 Harv. L. Rev. 713, 719-23, 726-28 (1986)), they miss the fundamental purpose of the state action doctrine: *to defer to the economic self-determination of the States* where States meet objective standards signifying the displacement of competition with other independent, *state* interests. *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 38-39 (1985); *Midcal, supra*, 445 U.S. at 103-105; see also Garland, *Antitrust and State Action*, 96 Yale L.J. 486, 489-90, 499.[1] Thus *Parker* was not a case of judicial examination of economic regulation, but one of judicial respect for the political process and federalism. "The true 'essence' of federalism is that States *as States* have legitimate interests which the national government is bound to respect even though its

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[1] Mr. Garland responds to those who argue that the *Midcal* test unfortunately polices state delegations of authority rather than capture by noting that the Court never intended restrictions on delegation to serve the purpose of policing capture: "Instead, the restriction on delegation was intended to reconcile the Court's respect for the *political process in the states with its respect for the national political process*. When viewed in this light the *Midcal* test serves its purposes tolerably well, . . . " Garland, *supra*, 96 L.J. at 499 (emphasis added).

laws are supreme. [*Citation.*]" *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 581 (1985) (O'Connor, J., dissenting) (emphasis added). While *Garcia* concerned the reach of federal regulation under the Tenth Amendment, it highlights the question of whether certain state economic regulation is a traditional government function that should be free of federal interference. *See* Jorde, *Antitrust and the New State Action Doctrine: A Return to Deferential Economic Federalism*, 75 Calif. L. Rev. 227, 230, note 18.

a. The *Midcal* Requirements As Deferential To The States

Amici States urging affirmance believe *Midcal* test as interpreted by this Court in recent decisions is still an appropriate means of determining the breadth of immunity from federal antitrust law for private conduct that is articulated as state policy. This is because it properly defers to states' own economic regulation, no matter how wise or unwise. As argued below, the Third Circuit properly employed the test in this case.

In the first prong of *Midcal*, the private conduct must be " 'one clearly articulated and affirmatively expressed as state policy' " *Midcal, supra*, at 105. "Moreover, a state policy that expressly *permits*, but does not compel, anticompetitive conduct may be 'clearly articulated' within the meaning of *Midcal*. [Fn. omitted.]" *Southern Motor Carriers Rate Conference v. United States, supra*, 471 U.S. at 61-62, & fn. 23 (emphasis in original). In *Southern Motor Carriers*, the Court examined whether statutes of four states shielded common carrier rate bureaus' collective

rate-making from antitrust enforcement and found that the legislatures of North Carolina, Georgia and Tennessee expressly permitted motor common carriers to submit collective rate proposals to public service commissions, which had the authority to accept, reject or modify any recommendations. The Mississippi statute, which provided that its common carrier commission would prescribe "just and reasonable" rates for intrastate transportation of commodities, but made no mention of collective rate-making, also met the first *Midcal* prong. *Southern Motor Carriers, supra*, 471 U.S. at 63-4.

However, in discussing Mississippi, this Court declined to scrutinize the "details of the inherently anticompetitive rate-setting process" in Mississippi. *Southern Motor Carriers*, at 64. The Court held a private party acting pursuant to an anticompetitive regulatory program "need not 'point to a specific detailed legislative authorization' for its challenged conduct. [*Citation.*] As long as the State as sovereign clearly intends to displace competition in a particular field with a regulatory structure, the first prong of the *Midcal* test is satisfied." *Southern Motor Carriers*, at 64. Where a statute clearly contemplates that the parties may engage in anticompetitive conduct or where anticompetitive effects would logically result from the authority to regulate, there is present an adequately articulated policy displacing competition. *Town of Hallie v. City of Eau Claire, supra*, 471 U.S. at 42; *City of Columbia et al. v. Omni Outdoor Advertising, Inc.*, 499 U.S. ___, ___, 113 L.Ed.2d 382, 393, 111 S.Ct. ___, ___ (1991). This Court has not required and need not require any greater specificity in the "clearly articulated policy" prong than already provided in *Southern Motor Carriers* and *Town of Hallie*.

The existing standard respects the particularities and unique attributes of state law-making and serves to curtail any tendency by federal courts to read state laws for their intent. Federal courts should look only to the broad objective standard to find the displacing policy. *See* Jorde, *supra*, 75 Calif. L. Rev. at 247-48. As then-Judge Kennedy stated in *Llewellyn v. Crothers*, 765 F.2d 769 (1985): "The availability of *Parker* immunity . . . does not depend on the subjective motivations of individual actors, but rather on the satisfaction of the objective standards set forth in *Parker* and authorities which interpret it. This must be so if the state action exemption is to remain faithful to its foundations in federalism and state sovereignty." *Llewellyn, supra*, at 774; *see also* Areeda, *Antitrust Immunity for "State Action" After* Lafayette, 95 Harv. L. Rev. 435, 439 (1981).

b. The "Active Supervision" Test Is Satisfied By The Fact Of Supervision

The second *Midcal* prong necessary to immunize private conduct, that of active supervision by the state, was not the subject of *Southern Motor Carriers*. Yet that case is instructive with respect to this prong, as, in that case, as here, collective rate proposals were submitted to state regulatory agencies and became effective if the agency failed to act within a specified time. Nonetheless, in *Southern Motor Carriers*, this Court found the state public service commissions had and exercised *ultimate* authority and control over all intrastate rates.[2] *Southern Motor*

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[2] This Court noted the Government conceded the relevant states, through their agencies, actively supervised the conduct of the private parties. *Southern Motors*, 471 U.S. at 66.

Carriers, 471 U.S. at 51; *see* Jorde, *supra*, 75 Calif. L. Rev. at 250.

In its most recent "active supervision" case, this Court again reiterated the "have and exercise authority" language of *Southern Motor Carriers*. *Patrick v. Burget*, *supra*, 486 U.S. 94. There, a hospital review committee terminated staff privileges of a hospital physician. The statute at issue provided for a peer review mechanism, but, as the Court held, Oregon law did not give the Health Division authority to review or overturn decisions that fail to accord with state policy, and thus, the state did not have and exercise ultimate authority over the private privilege determinations. *Patrick, supra*, 486 U.S. at 102-03. More to the point, Oregon did not "have" ultimate authority over the actions, irrespective of whether it "exercised" authority. Not having the authority, it certainly did not exercise it. The holding in *Patrick* was based entirely on the *failure of the state statutory scheme* to give the authority to the state Health Division to oversee the peer review committees. Nowhere did the Court scrutinize the *manner* in which state regulators would carry out this task; not having been so empowered, the question did not arise. As discussed below, *Patrick* is not apposite here, as these states had statutory schemes that empowered their insurance departments to review and approve or disapprove of submitted proposed rates. At issue here is whether the FTC should scrutinize the *quality* or *manner* of the "exercise" of authority given the states' departments when reviewing, approving or disapproving the rate filings.

In numerous opinions of the federal courts, it has been held that the focus of the active supervision prong

should be on the procedures by which the state controls the challenged collective rate-setting (*see Capital Telephone Company v. New York Telephone Company*, 750 F.2d 1154, 1163-1164, 1165 (2d Cir. 1984), *cert. den.*, 471 U.S. 1101 (1985); *Marrese v. Interqual, Inc.*, 748 F.2d 373, 389-390 (7th Cir. 1984), *cert. den.*, 472 U.S. 1027 (1985); *Turf Paradise, Inc. v. Arizona Downs*, 670 F.2d 813, 825 (9th Cir. 1982), *cert. den.*, 456 U.S. 1011 (1982); *see also Capital Telephone Company v. Schenectady*, 560 F.Supp. 207, 210-211 (N.D.N.Y. 1983)), not on the behavior or effectiveness of the state employees in carrying out the procedures.[3] It is the *fact* of supervision, not the *substance* of it which is the crux of immunity under *Midcal*. While requiring that states meet certain objective standards signifying the displacement of competition with other independent state interests, the *Midcal* test is appropriately deferential to the states as to how they, in their sovereign decision-making capacity, go about the business of regulating commerce within their borders.

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[3] In objectively evaluating the procedures in *Midcal*, the court noted the state had not (1) established prices; (2) reviewed the reasonableness of the price schedules; (3) did not monitor market conditions; nor (4) engage in any pointed reexamination of the program. *Midcal*, 445 U.S. at 105-06. These are objective factors which show whether the state exercises authority given it to regulate the anticompetitive conduct. *See New England Motor Rate Bureau, Inc. v. FTC*, 908 F.2d 1064, 1073 (1st Cir. 1990)(using two of the four factors to show Massachusetts "exercised" its power; noting also that the presence of all the factors is not required for such a showing).

II

THE THIRD CIRCUIT DID NOT ESTABLISH A NEW STANDARD FOR "ACTIVE SUPERVISION;" RATHER, THE FTC DEVISED A NEW STANDARD REQUIRING IT EXAMINE THE "STRICTNESS" OR "MEANINGFULNESS" OF A STATE'S REGULATION

1. Introduction

The Third Circuit correctly ruled here that the FTC erred in insisting on a particular measure of strictness or effectiveness in which the state must pursue its regulatory program in order for the "active supervision" prong to be met. *Ticor Title Insurance Company v. FTC*, 922 F.2d 1122 (3rd Cir. 1991). Quoting *New England Motor Rate Bureau, Inc. v. FTC, supra*, 908 F.2d at 1076, the Third Circuit noted:

> "Where as here the state's program is in place, is staffed and funded, grants to the state officials ample power and the duty to regulate pursuant to declared standards of state policy, is enforceable in the state's courts, and demonstrates some basic level of activity directed towards seeing that the private actors carry out the state's policy and not simply their own policy, more need not be established. Otherwise, the state action doctrine would be turned on its head. Instead of being a doctrine or preemption, allowing room for the state's own action, it would become a means for federal oversight of state officials and their programs." *Ticor Title, supra*, 922 F.2d at 1136, quoting *New England Motor Rate Bureau, Inc., supra*, 908 F.2d at 1071.

The above does not represent a new standard for determining when the "active supervision" prong is met.

To the contrary, it is a proper reading of *Midcal*, *Southern Motor Carriers*, and *Patrick*. As both Circuits came to grips with the factual settings before them, they followed *Patrick's* restatement of the active supervision prong to ask if the agencies "had" power to review and disapprove particular anticompetitive conduct and whether they "exercised" that power. The Commission has argued in this case that a "basic level of activity" to carry out the state's policy is an inadequate test and represents a new, more lenient standard for finding a state has "exercised" its authority. FTC Pet. at 8, 14. The Commission errs in treating the "basic level" language as a new test: it is simply indicia to gauge whether the regulatory program effectively guarantees that the "private actors carry out the state's policy and not simply their own policy;" in short, *evidence* of the state's exercise of its authority. Where such a basic level can be shown, the *fact* of active supervision is established, and the FTC should go no further to examine the quality, intensity or zeal with which the State regulates its industries.

Here, the FTC erred in insisting upon a new standard, uncalled for by *Midcal*, *324 Liquor Corp.*, or *Patrick*, of its own making, where active supervision can only be met by "meaningful" regulation. Nowhere has this Court set forth that the state action doctrine may be met only where states "meaningfully" regulate their industries. Such a standard invites the kind of arbitrary oversight as occurred in this case, when one commissioner found agency commissions "excessively high" or opined that a state regulator's resume demonstrated he was unqualified to do the state's work. *Ticor Title*, *supra*, 922 F.2d at

1138, 1140. Indeed, the FTC standard may have the paradoxical anticompetitive effect of encouraging more state regulation by forcing state regulators to require anticompetitive results through orders or decrees. Instead, once the objective standards for active supervision are met, the FTC should have no jurisdiction to evaluate the wisdom of states' anticompetitive policies or the effectiveness of their regulation. *New England Motor Rate Bureau, Inc.*, *supra*, 908 F.2d at 1072.

2. The Third Circuit Correctly Found The States "Exercised" Authority They "Had"

Petitioner attempts to reargue the facts, already examined and applied by the Third Circuit Court of Appeals. FTC Pet. at 15-18. Petitioner wants a new *qualitative* assessment of the regulators' actions in order to show there was insufficient exercise of the states' authority to regulate the rate-setting for title insurance search and examination services. In each case, however, the facts support the finding of the Third Circuit that the States "had" and "exercised" the requisite authority.

a. Wisconsin and Montana

There should be no question but that Wisconsin and Montana displaced competition with regulation for the title search and examination rate-filings. State law permitted the making of rates collectively, to be submitted by the rating bureau to the Insurance Departments. Wisc. Stat. § 625.13; Mont. Code Ann. §§ 33-25-212, 33-16-203. Illustrative of the authority vested by the state law in

rating bureaus is the exact language of Wisconsin Statute section 625.02:

> " . . . (2) 'Rate service organization' means any person, other than an employee of an insurer, who assists insurers in rate making or filing by:
>
> ". . . .
>
> "(b) *Recommending, making or filing rates* or supplementary rate information; . . . "

In these states, rates were not to be excessive, inadequate or unfairly discriminatory. Wisc. Stat. § 625.11; Mont. Code Ann. §§ 33-16-201, 33-16-311. Even where the State encouraged these rates to be formulated on the basis of competitive market conditions, there is no question but that the state policy set forth in the statutes had a foreseeable effect of ultimately displacing competition with the regulated, collectively-set rates. Avoidance of excessive or non-discriminatory rates is an expressly-stated state policy; it effectively substitutes for free competition in the market. No matter *how* the rates are formulated, e.g., based on competitive market conditions or otherwise, once they are submitted for review for consistency with the expressed state policies, they are subject to the first prong of *Midcal*, namely, they are pursuant to a clearly articulated policy of the State.[4]

Next, the circuit court was correct in finding Wisconsin "had" the authority to supervise the collective rate-

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[4] As noted by the Third Circuit, complaint counsel stipulated that the four states at issue clearly articulated the anti-competitive policies at issue here. 922 F.2d at 1140.

setting. The insurance departments were charged with ensuring that filings conform with the not excessive, non-discriminatory policies, cited above. Wisc. Stat. 625.11; Mont. Code Ann. §§ 33-16-201, 33-16-311. The departments were authorized to develop statistical plans for the reporting of loss and expense experience and to inquire of the rating bureaus' data on revenues and costs to help the regulator review the propose rates. Wisc. Stat. § 625.34; Mont. Code Ann. § 33-16-202. Procedures for the filing of rates and justifications by bureaus were established by law. Wisc. Stat. § 625.13; Mont. Code Ann. §§ 33-25-212, 33-16-203. The departments were authorized to approve or disapprove rate filings and were required to rescind any filings if they did not meet statutory criteria. Wisc. Stat. § 625.22, Mont. Code Ann. §§ 33-16-204 through 33-16-211.

Further, Wisconsin "exercised" this authority in relation to the three filings at issue, in 1971, 1981 and 1982. The administrative law judge found the insurance commissioner approved the submitted 1971 rates. This occurred after department officials met with bureau members, indicated they would review the filings and later indicated the filing was "acceptable," implying a review took place. Tr. 1619-1625. As the Third Circuit found, the department's program to review these rate filings was staffed and funded. *Ticor Title, supra*, 922 F.2d at 1140. The record also discloses the 1981 filing was reviewed, not merely for statistical accuracy, but also against financial and statistical information collected from title insurance companies, and that, upon review, the filing was "substantial." Tr. 1824. Similarly, the testimony of the department analyst showed the 1982 filing

was reviewed and approved. Tr. 1957. Further, mandamus was available to compel the public officers to perform any duties outlined in the statute, *Ticor Title, supra,* 922 F.2d at 1140; such duties are not a matter of the exercise of an officer's discretion. If these facts are to be taken as true, then surely these states "exercised" their authority to review the rates submitted to them and it is implicit therein that the review was of the reasonableness of the rates as they related to the state policies against non-excessive, non-discriminatory rates. Thus, there was evidence of the reasonableness review under *Midcal* to show the state "had" and "exercised" its authority. The *fact* of this supervision having been demonstrated, the FTC could not insist on more. Based on the foregoing, the Third Circuit opinion should be affirmed as to Wisconsin and Montana.

b. Arizona And Connecticut

As the FTC's own petition acknowledges, there was evidence before the commission to show the Arizona and Connecticut insurance departments reviewed rate-filings to see if they conformed with state policies and then approved or disapproved. FTC Pet. at 19. The Commission simply argues it was inappropriate for the appeals court to not defer to the fact-finding of the Commission in this regard. In fact, the Circuit Court of Appeals did not reweigh the facts, but properly applied facts to the law. In the Connecticut and Arizona cases, the facts speak clearly of active supervision. Commissioner Azcuenaga dissented from the majority on these cases, and her dissent, attached hereto as an appendix, is an eloquent statement of the appropriate role of the Commission in state

action doctrine cases and the importance of federalism to the analysis of the Commission and the courts. In her conclusion, Commissioner Azcuenaga states:

> "The majority finds a lack of active supervision even when the record contains direct evidence that substantive review occurred, choosing instead to emphasize various perceived deficiencies. The failure to carry out any statutory requirement, whether that requirement has anything to do with a review of proposed rates for consistency with state policy or not, is taken as proof that active supervision of rates did not take place. On the other hand, the failure to take action to limit commissions paid to attorneys demonstrates a lack of supervision even where such action is not authorized by the agency's enabling statute; the agency must review each and every 'critical component' of a proposed rate even if the state legislature intended only that it review the reasonableness of the rate itself. This comes perilously close to a 'heads we win, tails you lose' standard." (Separate statement of Commissioner Azcuenaga, concurring in part and dissenting in part, in *Ticor Title Insurance Co.*, [FTC] Docket No. 9190, p. 11.)

CONCLUSION

This case does *not* present this Court with a new, more lenient standard for "active supervision" set forth by the First and Third Circuit Courts of Appeals. However, the FTC *does* seek to have this Court adopt a new and inappropriate standard for "meaningful" "active

supervision" employed by the Federal Trade Commission. The Third Circuit in *New England Motor Rate Bureau, Inc., supra,* 908 F.2d 1064, followed existing standards set forth in *Midcal, 324 Liquor Corp.,* and *Patrick,* finding the states at issue "had" and "exercised" the requisite authority to see that the state policies, however anticompetitive, were carried out. They did so based on objective criteria that, once established, demonstrated the *fact* of supervision. The FTC, on the other hand, would continue the inquiry far beyond the fact of supervision to exact a "meaningful" and "effectiveness" review of the state's regulatory supervision. This new standard simply does not comport with the federalism principles underlying the state action doctrine and fails to defer in the slightest to the states' sovereign decision-making and economic self-regulation. It puts the FTC in the position of trying the state regulator. In the view of amici states urging affirmance, it "goes too far." *New England Motor Rate Bureau, Inc., supra,* 908 F.2d at 1075. Accordingly, this Court should affirm the opinion of the Third Circuit Court of Appeals.

DATED: December 23, 1991

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